

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>PAUL D. RICHARD</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>REDDI SERVICES</b>	)	
Respondent	)	Docket No. 1,003,482
	)	
AND	)	
	)	
<b>AMERICAN HOME ASSURANCE CO.,</b>	)	
<b>NATIONWIDE MUTUAL INS. CORP., AND</b>	)	
<b>WESTPORT INSURANCE COMPANY</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and one of respondent's insurance carriers, American Home Assurance Company (AIG) appealed the March 15, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.<sup>1</sup>

**ISSUES**

This is a claim for a series of accidents and injuries to claimant's knees from "[o]n or about 10/6/00 and each and everyday worked thereafter through last day worked[.]"<sup>2</sup>

At the March 1, 2004 preliminary hearing, the only issue before the ALJ was which of respondent's insurance carriers was liable for providing treatment for claimant's work-

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<sup>1</sup> AIG had the workers compensation insurance coverage for respondent from Oct. 1, 2000 until Oct. 1, 2001. Nationwide Mutual Insurance Company had the insurance coverage from Oct. 1, 2001 until April 25, 2002 and Westport Insurance Company (Westport) had the insurance coverage beginning April 27, 2002.

<sup>2</sup> K-WC E-1 Amended Application for Hearing (filed Oct. 25, 2002).

related left knee injury. No issue was raised at the preliminary hearing concerning whether that injury was work-related, or whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent. For purposes of preliminary hearing, Judge Hursh determined that respondent and AIG, one of respondent's insurance carriers would be mutually responsible for claimant's medical treatment.

AIG, one of respondent's insurance carriers, contends Judge Hursh erred in finding the injuries to claimant's knee to be work-related. In addition, AIG argues that claimant sustained a new work-related accident after its coverage ended and therefore, Westport should be liable for claimant's treatment. Although AIG attempts to frame the issue as "[w]hether the injury alleged by claimant arose out of and in the course of his employment[,]"<sup>3</sup> in its brief to the Board AIG admits this:

Although AIG does admit that the Claimant sustained an injury to his left knee on October 6, 2000 while AIG insured the Respondent, it is AIG's position that the Claimant's current medical needs for his left knee are not the result of this prior injury. The medical evidence before this court, and before the Administrative Law Judge, establishes that the claimant suffered an aggravation of his left knee injury by the work involved in his continued employment with the Respondent. As a result, the respondent insurance carrier at risk during the aggravation should be responsible for the left knee treatment needed by the claimant. That insurance carrier in this matter is Westport, not AIG.<sup>4</sup>

Westport argues that "[t]he issue raised by appellant AIG claim services, Inc. is not ripe for determination following the preliminary hearing and this appeal should be dismissed."<sup>5</sup> In the alternative, Westport contends that claimant has been working under restrictions since February 2001 and that the ALJ's finding of a date of accident during AIG's period of coverage should be affirmed. Westport further asserts that all of claimant's left knee problems are attributable to his October 2000 accident and there was no repetitive use injury thereafter.

In his brief to the Board, claimant states all parties stipulated at the preliminary hearing that he developed or aggravated his bilateral knee conditions from his work with respondent and that this claim was compensable. No issue of compensability was raised by counsel for respondent nor any of the insurance carriers at the preliminary hearing.

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<sup>3</sup> AIG's Request for Board Review (filed March 23, 2004).

<sup>4</sup> Appellant's Brief Against the Administrative Law Judge's Decision to Grant Benefits Against AIG Claim Services, Inc. at 10 (filed April 20, 2004).

<sup>5</sup> Brief of Respondent Reddi Management Company and Westport Insurance Company at 1 (filed April 22, 2004).

"The only question, and the real battle in this claim is which carrier would be subjected to liability for the claimant's left knee."<sup>6</sup>

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes that this appeal should be dismissed.

At the preliminary hearing, there was no dispute that claimant's present need for medical treatment was the result of an injury or injuries that arose out of and in the course of his employment with respondent. Therefore, that issue will not be considered for the first time on appeal.<sup>7</sup> Accordingly, the sole issue on appeal is which insurance carrier is responsible for the cost of providing medical treatment for claimant's knee. This dispute would be resolved by determining the appropriate date of accident. But that is not an issue listed in K.S.A. 44-534a as jurisdictional and does not otherwise raise an issue that the ALJ exceeded his jurisdiction.<sup>8</sup> Clearly, the ALJ did not exceed his jurisdiction.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>9</sup>

The Board is unaware of any provision in the Workers Compensation Act that purports to give the Board jurisdiction to review a preliminary hearing order for redetermining the liability among multiple insurance carriers. The Board was presented with a similar issue in *Ireland*<sup>10</sup> where, in holding that the Board was without jurisdiction to consider the issue of which insurance carrier should pay for preliminary hearing benefits, the Board said:

Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The

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<sup>6</sup> Claimant/Appellee's Brief in Response to Respondent and American Home Assurance's/Appellant's Application for Review by Workers Compensation Appeals Board at 1 (filed April 30, 2004).

<sup>7</sup> See K.S.A. 44-555c(a).

<sup>8</sup> K.S.A. 44-551(b)(2)(A); See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>9</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>10</sup> *Ireland v. Ireland Court Reporting*, No. 176,441 & 234,974, 2002 WL 985408 (Kan. WCAB Feb. 1999).

employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established.<sup>11</sup>

**WHEREFORE**, the Board dismisses the appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2004.

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BOARD MEMBER

- c: Timothy E. Power, Attorney for Claimant  
Mirko Bolanovich, Attorney for Respondent and Nationwide Mutual Ins. Co.  
David F. Menghini American Home Assurance Company  
Brian J. Fowler, Westport Insurance Company  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>11</sup> See *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961).